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No. 85-1257

In The
Supreme Court of the United States
October Term, 1985

TERRY ROGERS and BRENDA ROGERS,
Appellants,

v.

CHEYENNE AIRPORT BOARD
and CITY OF CHEYENNE,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF WYOMING
APPELLEE'S MOTION TO DISMISS

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QUESTION PRESENTED

The substantive question in this case is whether the City of Cheyenne Municipal Airport Zoning Ordinance, providing a height limitation in a non-instrument approach zone to the Cheyenne Municipal Airport, is a violation of the United States Constitution as a taking of private property for public use without just compensation.

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Pursuant to Rule 16.1, the appellees, Cheyenne Airport Board and City of Cheyenne, move the Court to dismiss the appeal herein on the ground that the appeal does not present a substantial federal question, or upon the ground that there is no final judgment upon which this Court can exercise its appellate jurisdiction.

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STATUTORY PROVISIONS INVOLVED

In pertinent part, 28 United States Code Section 1257 provides that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

Section 7(d) of the Cheyenne Municipal Airport Zoning Ordinance provides:

> (d) Variances. Any person desiring to erect or increase the height of any structure, or permit the growth of any tree, or use his property, not in accordance with the regulations prescribed in this ordinance, may apply to the planning commission for a variance from such regulations. Such variances shall be allowed where it is duly found that a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but will do substantial justice and be in accordance with the spirit of this ordinance.

Other pertinent, constitutional and statutory provisions have been supplied to the Court by the Appellants in their Jurisdictional Statement.

STATEMENT

On April 12, 1984, Terry Rogers and Brenda Rogers (Rogerses) brought an action in the First Judicial District Court for the State of Wyoming, praying that the Cheyenne Municipal Airport Zoning Ordinance be declared unconstitutional under the provisions of Article I, Section 7 of the Wyoming Constitution and the Fifth and Fourteenth Amendments to the United States Constitution and for an injunction preventing enforcement of the ordinance. Following an adverse decision in that case, the Cheyenne Airport Board appealed to the Supreme Court for the State of Wyoming. The Wyoming Supreme Court reversed the trial court in *Cheyenne Airport Board v. Rogers,* 707 P.2d 717 (Wyo. 1985) and held that:

> a. there was no taking of a private interest in property by direct and substantial interference with the use and enjoyment of Rogerses' property which must be remedied by inverse condemnation; and
>
> b. the impact of the Cheyenne Municipal Airport Zoning Ordinance on the entire property is not so severe that it effects a taking without payment of just compensation. *Id.* at 729 and 732.

At no time in the trial court proceedings did the Rogerses claim, nor was evidence presented, that Rogerses' property was subjected to direct interference from airplane overflights or that overflights interfered with the use and enjoyment of their residential property. Contrary to the assertion of Appellants in their Jurisdictional Statement, the record is also completely void of any evidence that Appellants applied for a variance to the City of Cheyenne planning commission as they had the right to do under the provisions of Section 7(d) of the Cheyenne Municipal Airport Zoning Ordinance.

ARGUMENT

1. THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The Wyoming Supreme Court correctly applied the principles and standards articulated by this Court, and its decision does not conflict with other state court decisions which address a similar issue. In determining that the regulatory impact of the Cheyenne Municipal Airport Zoning Ordinance on Rogerses' property was not so restrictive as to constitute a taking, the Wyoming Supreme Court applied the law as stated in *Village of Euclid v. Ambler Realty Co.*, 365 U.S. 359 (1926) and in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

The trial court found that the purpose of the ordinance was for the promotion of the public's safety and general welfare. The Wyoming Supreme Court reiterated that finding and found the ordinance to be in accord with substantive due process and the *Village of Euclid* case. *Cheyenne Airport Board*, 707 P.2d at 727.

The general principles discussed by this Court in *Penn Central Transportation Co. v. New York City* are the appropriate ones to be applied to restrictive zoning such as the Cheyenne ordinance in question. *Penn Central* dealt with architectural (including height) restrictions imposed upon private property. *Penn Central*, 438 U.S. at 116-118. That case upheld the restraints imposed upon the property owner and in so doing, stated:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several

> factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct and investment-backed expectations are, of course, relevant considerations. See *Goldblatt v. Hempstead, supra,* at 594. So, too, is the character of the governmental action. A "taking" may be more readily found when the interference with property can be characterized as a physical invasion by the government, see, *e.g., United States v. Causby,* 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. *Id.* at 124.

No evidence was presented in this case to demonstrate any interference with investment-backed opportunities contemplated by the Rogerses, nor of a particular impact on the residential use of their property as a whole. Without a showing that the height restriction constitutes a significant restriction on the use of their property as a whole, Appellants' suggested result is contrary to the standards of the *Penn Central* case. *Id.* at 125, 127 and 130-131.

No actual property has been appropriated from the Rogerses. Rather, they are being restrained in one spacial area of their property, a restriction also applied to neighboring and similar properties. This restriction upon one right found in the group of ownership rights which belong to Appellants was properly found to be permissible under the principles of this Court.

2. NO PHYSICAL OCCUPATION OF ROGERSES' PROPERTY EXISTS AND THE PRINCIPLES OF LORETTO v. TELEPROMPTER MANHATTAN CATV CORP. ARE INAPPLICABLE.

Contrary to Appellants' assertion in their Jurisdictional Statement, the *per se* analysis applied by the Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) is inappropriate here. No evidence was presented below which would support the Rogerses' position that a physical occupation of their property has occurred. Intermittent aircraft flights are not equivalent to a permanent physical invasion such as that addressed by this Court in *Loretto*. No permanent physical occupation of Rogerses' property (the determinative factor in *Loretto*) has ever been demonstrated. *Id.* at 433-435. Appellants attempt to equate a height restriction and occasional overflights with a permanent physical occupancy by a governmental agency for the public use. That argument was addressed and properly rejected by the Wyoming Supreme Court. *Cheyenne Airport Board*, 707 P.2d at 729.

Appellants also argue that application of this Court's conclusions in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) will change the result in this case. However, the Wyoming Supreme Court discussed this case in light of *Kaiser Aetna*, and rejected its applicability. *Cheyenne Airport Board*, 707 P.2d at 729.

In *Kaiser Aetna*, this Court stated that "the exercise of the public right of navigation over interstate waters that constitute highways for commerce" did not always require compensation. *Kaiser Aetna*, 444 U.S. at 175. The Court found a taking in that case because public

access was required on *Kaiser Aetna*'s private property. However, the determinative factor seemed to be *Kaiser Aetna*'s substantial investment in improvements rather than, or solely because of, the public access. The Wyoming Supreme Court correctly applied the required law and rejected the applicability of both *Loretto* and *Kaiser Aetna*.

3. THERE IS NO CONFLICT AMONG THE STATE COURTS WHICH HAVE ADDRESSED AIRPORT ZONING.

Results from state courts in cases dealing with airport zoning have been diverse. However, almost without exception those courts have applied the same principles in reaching their results. *See, e.g., Ackerman v. Port of Seattle,* 55 Wash. 2d 400, 348 P.2d 664, 671 (1960) (case in which the Washington Supreme Court found a taking because of continuous, frequent and low overflights); *compare Village of Willoughby Hills v. Corrigan,* 29 Ohio St. 2d 39, 278 N.E.2d 658, 663 (1972), *cert. denied,* 409 U.S. 919 (1972) (airport zoning found to be within the police power and valid). Those and other well-reasoned decisions have relied, *inter alia,* on this Court's holding in *United States v. Causby,* 328 U.S. 256, 266 (1946) and required a finding of direct, substantial interference with the use of the property before a taking could be found. *See, also, Griggs v. County of Allegheny, Pennsylvania,* 369 U.S. 84 (1962), *reh'g denied,* 369 U.S. 857 (1962). When a taking was found, the facts were particularly egregious.

The Wyoming Supreme Court applied the *Causby* test in reviewing the Rogerses' case. The court reached the appropriate result based upon the fact that Rogerses

had never " . . . demonstrated any evidence of substantial interference with the use and enjoyment of the surface." *Cheyenne Airport Board*, 707 P.2d at 729. Overflight simply was not an issue in the case, no interference with the property's use as a whole was shown, and there was no evidence of adverse surface impact.

4. THIS COURT MAY NOT HAVE JURISDICTION TO HEAR THIS APPEAL AS THE ROGERSES HAVE NOT APPLIED FOR A VARIANCE.

Appellees believe that further proceedings in this case will not produce a different result. Correct application of the law dictates that the case be affirmed. However, there may also be a procedural defect upon which the Court could decline jurisdiction.

The Cheyenne Municipal Airport Zoning Ordinance provides, in Section 7(d), for a procedure by which the Rogerses may apply for a variance from application of the ordinance to their property. At no time was variance application made to the City of Cheyenne. In light of this Court's recent decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. —, 105 S. Ct. 1381, 87 L. Ed. 2d 126, 147 (1985), the failure to apply for the variance may well be fatal to this appeal. A final administrative decision has not been rendered, and further proceedings could possibly dispose of the taking issue. If the case is not ripe for review, the Court has no jurisdiction to proceed. 28 U.S.C. § 1257.

In *Williamson County*, this Court also raised the issue of potential, contemplated inverse condemnation proceedings. *Id.* at 143; *see, also, Ruckelshaus v. Monsanto Co.*, — U.S. —, 104 S. Ct. 2862, 2878 (1984). The failure of Rogerses to bring an action for inverse condemnation in

the Wyoming courts should, however, not be fatal to this appeal. The Rogerses' right to bring such an action, although available pursuant to the Wyoming Statutes Section 1-26-516 (Supp. 1985), is precluded by the holding in the Wyoming Supreme Court that no taking has occurred. That holding will be *res judicata* on the taking question and no compensation could be awarded.

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CONCLUSION

The decision in the Wyoming Supreme Court was correct and was based upon the proper application of settled principles of law articulated by this Court. The results from other state courts, when examined, do not conflict with the state court decision in this case. For those reasons, this case does not present a substantial federal question, and further proceedings would not produce a different resolution of the issue. This case should be dismissed.

Respectfully submitted,

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